ed rule of pleading that fraud must be specifically pleaded so as not to catch the other party by surprise and enable them to put up a proper defence. It may be that Aishah's insanity if proved to be so during the distribution proceedings before the Collector is material to the question of distribution. Had that been made known to the Collector by the plaintiffs who were also present with Aishah there was nothing to stop him from appointing some proper and suitable person as guardian for the purpose of the proceedings by virtue of section 10(1) of the Small Estates(Distribution) Act. The manner of distribution under the Muslim law would still be the same. The pleadings clearly show the plaintiffs should well be aware of Aishah's condition for according to them she had been insane for the last thirty years. Both are her natural daughters. Yet neither of them informed the Collector. It was only about five months or so later that Aishah was admitted to the General Hospital, Penang, for observation and declared to suffer from pre-senile dementia and incapable of managing her own affairs. The same position applies to the claim that she is entitled to half portion as syarikat share of the deceased's estate. That the plaintiffs must have been aware of it, if the allegation is true, when they were before the Collector, is an irresistible conclusion deducible from the pleadings and the Agreed Bundles of Documents. Had they informed the Collector the matter could be referred to the court as a collateral dispute under section 14 of the Act. They had that knowledge yet refrained from doing so. There is authority for the proposition that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who has invited or allowed the court (in the present case the Collector) to exercise it in the wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. (See *Ex parte Pratt*[7] and *Ex parte May*).[8] To my mind, there is a glaring absence of any ground for fraud and in the circumstances there seems to be no cause of action.

I have no alternative but to dismiss the claim with costs.

Claim dismissed.

Solicitors: *Oo Gin Sun & Co.; R. C. Murugeson.*

YEAP LEONG HIN & ORS. v. LEE CHENG KIN & ANOR.

[O.C.J. (Arulanandom J.) March 28, 1975]
[Penang — Originating Summons No. 366 of 1974]

Practice and Procedure — Trust — Beneficiaries to the action — Adopted children — R.S.C. 1957, O.55 rr.3(1)(e) and 14A.

This was an application by the beneficiaries of an estate for certain orders relating to the estate.

The defendants, the executors and trustees took a preliminary objection to the application in that all beneficiaries had not been included in the action.

Held: the three beneficiaries who were not parties were fully aware of the proceedings and had no interest in the trust. In the circumstances there was no necessity for them to be represented by the trustee or any one else.

Obiter: Adopted children can only be entitled if legally adopted under the Adoption Ordinance by the testator.

ORIGINATING SUMMONS.

Lim Ewe Hock for the first and second plaintiffs.

Gan Teik Chee for plaintiffs Nos. three to ten.

Philip Hoalim Jr. and *I. K. Meek* for the defendants.

Arulanandom J.: This is an application by ten beneficiaries of the Will of Yap Kim Hoe (deceased) dated September 8, 1959 against the defendants, the executors and trustees of the Will, for the following orders under Order 55 rule 3(1)(e) and Order 55 rule 14A of the Rules of the Supreme Court 1957 namely:—

1. An order that the right to transfer the stock and shares specified in the First Schedule hereto or such stock and shares as are now held under the said Will Trust do vest in the first eight (8) plaintiffs abovenamed or their nominees and that the Secretary of the respective companies in which the said stock and shares are held be empowered to execute transfers of the said stock and shares to the said plaintiffs or their nominees, the defendants having neglected to transfer the same to the order of the plaintiffs for more than 28 days after the request on behalf of the plaintiffs so to do;
2. That (subject to such provision for payment of the allowances under clause 8 of the said Will as the court may deem fit), the defendants do forthwith surrender, assign or transfer the land specified in the Second Schedule hereto and the right to recover the debt specified in the Third Schedule hereto and deliver up all cash, chattels and assets whatsoever held by the defendants under the said Will Trust to the first eight (8) plaintiffs abovenamed or their nominees;
3. That the defendants do forthwith surrender and deliver up all documents of title, share certificates, accounts, records and paper writing whatsoever belonging to or pertaining to the said trust to the plaintiffs or their nominees;
4. Further or other reliefs;
5. That the defendants do personally pay the costs of, and incidental to, this application.

The defendants entered appearance and filed an affidavit resisting the application on the grounds that

the trusts of the Will had not been terminated and that there were difficult matters of law concerning the proper destination of the accumulated income of the trust which exceeded $1,000,000.

Before the commencement of the hearing defendants' counsel indicated to the court that a preliminary objection would be taken to the application in that all the beneficiaries had not been included in the action.

Counsel for defendants submitted to the court that the question before the court was whether the interest earned by the trusts were contingent or vested and that all classes of persons who may be entitled to distribution under intestacy should be represented. Counsel argued that the trustees must be protected by order of court.

Counsel for applicants however submitted that of the known beneficiaries who were not parties three of them were aware of the proceedings and were not interested in the trust. Counsel indicated that as far as the fourth was concerned Oei Sioe Nio could be served.

Having considered the preliminary objection, the court is of the view that there is no merit in the preliminary objection. Gladys Yeap, Nancy Yeap and Julia Yeap by the documents they have filed in court have made it abundantly clear that they are fully aware of the proceedings and have no interest in the trust. In the circumstances there would be no necessity for them to be represented in the proceedings by the trustees or any one else. They are *sui juris* and they cannot be heard later to complain that the trustees had not looked after their interest. As regards Oei Sioe Nio, as indicated by counsel for applicants she can be served.

Counsel for defendants also suggested the possibility of there being adopted children. Adopted children can only be entitled if legally adopted under the Adoption Ordinance by the testator. If there were any adopted children adopted by the testator, their existence would be known by this time considering the status of the testator and the time of death. Hence the trustees need not be appointed to represent such an unknown or unnamed class.

Under the circumstances the preliminary objection is overruled. Oei Sioe Nio should be served with all the proceedings. Originating Summons to proceed to hearing.

Solicitors: *Lim Ewe Hock; Gan Teik Chee; Sharikat Goh Guan Hoe; Presgrave & Matthews.*

HASHIM BIN MOHAMED ZAIN & ANOR. v. WAN HONG WAI & ORS.

[O.C.J. (Mohamed Azmi J.) April 2, 1975]
[Kuala Lumpur — Civil Suit No. 589 of 1974]

Mining — Mining permit — Dispute relating to validity of mining agreement — Application for interim order to renew mining permit — Whether fair and equitable that application be granted.

The plaintiffs were the joint lessees of mining land and had entered into a mining agreement with the third to seventh defendants. The first and second defendants were attorneys of the first and second plaintiffs. The plaintiffs brought an action against the first and second defendants alleging that the power of attorney given to them was obtained by fraud. The other defendants applied to be joined in the action.

The third to seventh defendants applied for an *interim* order that the plaintiffs or their attorneys execute a permit to mine in their favour under the mining agreements.

Held: the continuation of the mining operations would in no way prejudice the rights of the parties and irreparable damage would be caused to the applicants if the permit to mine is not renewed. Having regard to all the circumstances it was fair and equitable that the application be granted.

[Editorial Note: An appeal against this decision to the Federal Court was withdrawn and struck out on November 10, 1975, vide F.C. Civil Appeal No. 59 of 1975].

Cases referred to:-

(1) *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173.

(2) *Australian Blue Metal Ltd.* v. *Robert Frank Hughes & Ors.* [1962] 3 W.L.R. 802.

(3) *Martin-Baker Aircraft Co. Ltd. & Anor.* v. *Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556.

CIVIL SUIT.

Roger K. H. Tan for third to seventh defendants/applicants.

Mohamed Azam Shuja (*Lin Soo Meng* with him) for the first plaintiff/respondent.

Au-Yong Khuen for the second plaintiff/respondent.

J. G. Bernatt for the first and second defendants/respondents.

Mohamed Azmi J.: This is an application by Summons-in-Chambers on the part of the third, fourth, fifth, sixth and seventh defendants (hereinafter referred to as "the applicants") for an order that the first and second plaintiffs or, alternatively, their respective attorneys, the first and second defendants, execute a permit to mine in their favour for the period February 20, 1975 to February 19, 1976 in respect of mining land held under Mining Certificate No. 1/74, Daerah Pekan, Mukim Endau, Sungai Tempat A Pahang, and other ancillary reliefs. The case came up in Chambers on February 24, 1975 before Gill C.J. who adjourned it into open court on a date to be fixed. The case came up before me on April 2, 1975; and after hearing arguments, I allowed the application with a further order that pleadings in this case be closed within one month and for an early trial. The first plaintiff and defendant Nos. 1 and 2 have now appealed against the said orders.

The facts leading to the present application are as follows. The two plaintiffs are the joint lessees of mining land under Mining Certificate No. 1/74 in the Mukim of Endau, Daerah Pekan, containing an area of approximately 397 acres. On October 16, 1973 they entered into a mining agreement with the third and fourth defendants whereby they promised